In the Supreme Court of the United States

No. 76-86

McCLATCHY NEWSPAPERS, a corporation; ELEANOR McCLATCHY; C. K. McCLATCHY; BYRON CONKLIN; and CARLO BUA,

Petitioners,

vs.

WILLARD M. NOBLE and ETTA M. NOBLE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Willard M. Noble, et al.*, vs. *McClatchy Newspapers, et al.*, Nos. 72-2021 and 72-2042 below.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It appears in 1975-2 Trade Cases ¶ 60,594, and is set forth as Appendix A hereto.

The district court wrote no opinion. Certain of its rulings on

All emphasis in quotations has been added unless otherwise stated.

matters not involved in the petition are reported in 1972 Trade Cases ¶ 73,957.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. ¶ 1291. Its judgment was entered November 14, 1975. Respondents filed a timely petition for rehearing which was denied May 20, 1976. 1976-1 Trade Cases ¶ 60,905, Appendix B hereto.

The district court's jurisdiction was invoked under Section 4 of the Clayton Act, 15 U.S.C. ¶ 15, and 28 U.S.C. ¶ 1337.

QUESTIONS PRESENTED

1. Does the fact that a restraint of trade is of a type which is unreasonable *per se* dispense with the necessity that it be either in or affect interstate commerce in order that the Sherman Act apply? The court below held that it did.

2. Does the rule of *per se* illegality of territorial restrictions of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) apply to the local distribution of daily newspapers? The court below held that it did.

3. Has not a district court discretion to inform the jury in a private suit for violation of the Sherman Act that the court will treble the jury's award of actual damages? The court below held that it has not.

STATUTES INVOLVED

Title 28 U.S.C. ¶ 1337:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Sherman Act, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended:

Section 1 (15 U.S.C. ¶ 1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Clayton Act, Act of October 15, 1914, c. 323, 38 Stat. 730, as amended:

Section 4 (15 U.S.C. ¶ 15):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE[1]

1. The Parties and the Facts.

The Sacramento Bee ["the *Bee*"] is a newspaper in Sacramento, California, there manufactured and published by petitioner McClatchy Newspapers ["McClatchy"]. Respondent Noble was a city newsstand distributor of the *Bee*, with primary responsibility for distribution of the *Bee* in an area (called "Newsstand 5") consisting of part of the City of Sacramento and of nearby suburban hamlets, all lying within 20 miles of downtown Sacramento, some 90 miles from the nearest state border.

Under his contract with McClatchy, Noble received full credit for unsold and returned papers. Customarily, Wednesday editions of the *Bee* contained numerous coupons by which a shopper could obtain a discount from grocers on advertised wares. Advertisers complained to the *Bee* about bulk traffic in coupons, which caused them to redeem coupons not used in *bona fide* purchases, and the

1. The facts are taken from the opinion below (App. A) and portions of the record reproduced in Appendix C.

Bee discovered that Noble had been submitting and taking credit for thousands of returns of Wednesday papers from which the food coupons had been removed. It also discovered that Noble was drawing far more papers on Wednesdays than he could be expected to sell legitimately. Noble conceded that he had been selling thousands of Wednesday papers to persons he knew were going to cut out the coupons and sell them, and that he himself had been selling coupons by the bag. (App. pp. 25-29). The *Bee* then told Noble and all its other distributors that trafficking in coupons would be cause for termination, and it entered into new contracts with them, expressly providing that a distributor would "not sell in bulk for purposes of abnormal use of said coupons" (App. p. 4, fn. 4). Noble's latest contract provided for cancellation by either party on 30 days' notice to the other. Later Noble complained to the *Bee* that this contract was illegal because it prevented him from selling coupons. Because of this and other complaints, the *Bee's* patience was exhausted, and it terminated the contract.

Noble at once filed this suit asserting violation of the Sherman Act.[2] He made four claims at the trial, for "exclusive dealing," for "monopolization", for "territorial restriction", and for denial of the right to sell "his business".

As respects the claim of "territorial restriction", his distributorship contract did not define the boundaries of "Newsstand 5" and did not forbid him from selling the *Bee* in other areas (App. pp. 24-25). The *Bee* refused to fix any boundaries, although Noble requested it to do so. It was testified on both sides that the contract created nothing but an area of primary responsibility (App. pp. 23, 25), which is plainly lawful. E.g., *Colorado Pump & Supply Co. v. Febco Inc.*, 472 F.2d 637 (10 Cir. 1973). Noble testified that the only restriction ever placed on him was that he was not to traffic illegally in merchandise

2. Noble's wife was a party to his contract and therefore a plaintiff. Petitioners Conklin and Bua were petitioners' employees.

coupons (App. p. 27), and that it was his understanding that he could sell wherever he could. (App. p. 24). But he based his claim of "territorial restriction" on the assertion that the *Bee* wished to split the area of "Newsstand 5", assigning part to another distributor, and that he was terminated because he refused to agree to the split. His counsel defined his "territorial restriction" claim thus:

> "plaintiffs * * * contend that they were injured by reason of defendants' alleged violation of Section 1 of the Sherman Act, in that plaintiffs' refusal to agree to defendants' territorial restrictions on their sale and distribution of the Sacramento Bee newspaper by splitting their dealership in half was a substantial factor in causing defendants to terminate them as distributors of the Sacramento Bee newspaper effective July 1, 1969." (App. p. 37)

The jury returned a verdict against Noble on this claim and the claims of "exclusive dealing" and "monopolization" and for him on the claim of denial of right to sell "his business", and judgment was entered accordingly.

2. The Decision of the Court Below.

On cross-appeals the court below affirmed the judgment as respects the claim of monopolization and reversed it with respect to the claim of denial of right to sell the business[3] and also with respect to the territorial restriction claim. This petition is confined to the "territorial restriction" claim. The court reasoned that the jury could "infer" a "tacit understanding" of a territorial restriction from the facts that McClatchy maintained maps showing the boundaries of areas for which distributors were responsible, that some of its distributors confined their efforts to the areas for which they were responsible, and that McClatchy

3. No error had been assigned with respect to the "exclusive dealing" claim, and the court below directed judgment to be entered for McClatchy on the denial of the right to sell.

had suggested to Noble that his area was too large for one man to handle effectively and that it should accordingly be split. Having thus reasoned that a jury *could* have inferred a tacit agreement, the court then reasoned that the jury may have done so but nevertheless failed to return a verdict for Noble because it found no effect on interstate commerce. Said it (App. 9):

> "Plaintiffs contend that the district court should have instructed the jury that an agreement to restrict the territory in which newsspapers purchased from McClatchy could be sold would have been a per se violation of section 1 of the Sherman Act, and it was therefore unnecessary for plaintiffs to prove an unreasonable restraint of interstate commerce would have resulted from such an agreement. Plaintiffs correctly state the law."

Again (App. 16):

> "Since under *Schwinn* the jury should have been instructed that such territorial restrictions are per se unreasonable, the judgment for defendants on the termination claim must be reversed and remanded for a new trial."

Thus the court sustained Noble's contention that the trial court had improperly declined to give an instruction reading as follows:

> "Because a vertically imposed restriction upon the resale of a product by a manufacturer after it has parted with ownership of it is a *per se* violation of Section 1 of the Sherman Act it is unnecessary for plaintiffs to prove that there has been a restraint of interstate trade and commerce as a result of such restriction—it is presumed." App. p. 40.

The court also held that the district court had erred in another respect. The district court had explained to the jury the purpose of the Clayton Act § 4 (15 U.S.C. § 15), instructed it that its function was to determine the actual amount of damages sustained, "no more, no less" and not to treble that amount or to add attorney fees, and had added (App. p. 38):

> ". . . it is the function and duty of the Court in the event that you should award damages to treble that amount in the judgment . . ."

The court below, by a 2 to 1 vote, held that it was error to inform the jury that its award would be trebled.

The court's decision, November 14, 1975, rests entirely on its interpretation of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), as establishing an intractable *per se* rule. Meanwhile, the whole court, *en banc*, had under consideration the scope of *Schwinn* in *GTE Sylvania Incorporated v. Continental T.V. Inc., et al.* in which a previous panel opinion by Judge Browning, who also wrote the opinion in this case, had been withdrawn. The petition for rehearing in this case, timely filed on December 3, 1975, was thus held under submission until *Sylvania* was decided *en banc* on April 9, 1976, by a split court, 7 to 4. (1976-1 Trade Cases ¶ 60,848) Judge Trask, one of the panel in this case, recused himself and did not participate in *Sylvania*, and Judge Browning there dissented.[4] The court *en banc* in *Sylvania* disapproved "any language in the *Noble* opinion that may be inconsistent with any of the majority's language in the present case." The panel in this case concluded that *Sylvania* did not require it to change its decision here, and it thereupon denied the petition for rehearing on May 20, 1976.

REASONS FOR GRANTING THE WRIT

The three questions stated above call for the writ because they involve fundamental antitrust questions. On the first, the decision below is a surprising departure from the law settled by this Court so recently as *Gulf Oil Corporation v. Copp Paving Co.*, 419 U.S. 186 (1974). On the second, there is conflict among the circuits and the courts of appeal are calling for guidance. On the third there is conflict among the circuits.

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4. The third judge of the panel in the instant case, Judge Gray, is a district judge and therefore did not participate in *Sylvania*.

What the court below did was to hold that an agreement imposing territorial restrictions could be inferred from facts universally present in local newspaper distribution everywhere in the nation, then held that the inferred restriction was an unreasonable restraint *per se*, and then that no presence in or affect on interstate commerce is necessary to bring such a restraint under the Sherman Act. By those three steps, every local newspaper in the country becomes a likely antitrust defendant, with no way to protect itself from potential punitive liability other than to replace independent carriers with company employees.[5] We think the reasoning which infers a tacit agreement of territorial restriction from the facts is flawed. But, accepting it for purposes of this petition, the decision is in grave error, and even more so if such an inference is permissible, and, by its expansion of federal jurisdiction to purely local matters, subjects every newspaper to liability because of the unalterable facts of the business.

I. That a Restraint of Trade Is of the per se Type Does Not Dispense With the Necessity That It Be Either in or Affect Interstate Commerce.

It has long been elementary that the Sherman Act is not implicated unless two elements conjoin:

(1) There is a restraint of trade which is unreasonable either because

(a) it is unreasonable in fact or

(b) it is deemed unreasonable *per se*, and

5. As Mr. Justice Douglas predicted in *Standard Oil Company v. United States*, 337 U.S. 293, 319 (1949), statutes designed to preserve small merchants can suffer interpretations foretelling their demise. This is already the present trend in the newspaper business, where carriers are being replaced by employees. E.g., *Lamarca v. The Miami Herald Publishing Co.*, 395 F.Supp. 324 (S.D. Fla. 1975); *Millcarek v. Miami Herald Publishing Co.*, 388 F.Supp. 1002 (S.D. Fla. 1975); *McGuire v. The Times Mirror Co.*, 405 F.Supp. 57 (C.D. Cal. 1975).

(2) the restraint is either in or has a substantial adverse effect on interstate commerce. *Gulf Oil Corp. v. Copp Paving Co., supra; United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975); *Hospital Building Co. v. Trustees of Rex Hospital*, ... U.S. ....., 1976-1 Trade Cases ¶ 60,885 May 24, 1976.

But the decision below holds that, if the restraint is unreasonable because it is of a type deemed unreasonable *per se*, the second requirement—that the restraint be in or affect interstate commerce—vanishes. This assigns to a *per se* situation a double office, the first, to produce unreasonableness of the restraint, the second, to usurp the requirement of commerce. This rewrites the basic formula to read that the Sherman Act is implicated (1) if there is a restraint of trade which is unreasonable *per se*, regardless of commerce or (2) if the restraint of trade, though not unreasonable *per se*, is unreasonable in fact, and, in addition, is either in or has a substantial adverse effect on interstate commerce.

This revision of the law is a heresy, which should be rooted out before it spreads.

While McClatchy may be engaged in interstate commerce because newsprint, ink, and advertising reach it across state lines, this case has nothing to do with any restriction on that commerce. The trade here involved is the purely local distribution in the environs of Sacramento of a newspaper printed there, all in California. The cancellation of Noble's contract had no effect on interstate commerce. It did not result in the importation of less ink or newsprint or anything else into California or in fewer copies of the *Bee* leaving California. It did not even affect the distribution of the *Bee* in "Newsstand 5", for that distribution continued unabated albeit in other hands than Noble's.

The court below did not hold that the activities involved were in interstate commerce or that interstate commerce was affected, and could not, for such a holding would have foundered

for want of an anchor "in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws." *Gulf Oil Corp. v. Copp Paving Co., supra,* 419 U.S. 198. The court below merely held that no restraint of interstate commerce was necessary or, what was the same thing, that effect on interstate commerce was conclusively presumed because of the supposed *per se* nature of the restraint.

This is not warranted by *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967). It is a radical departure from anything ever previously decided. So late as *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), the classic *per se* case because it was a price-fixing case, the Court framed the issues for decision, saying (421 U.S. at 780):

> "Our inquiry can be divided into four steps: did respondents engage in price fixing? *If so,* are their activities in interstate commerce or do they *affect interstate commerce?*"

After answering the first question affirmatively, the Court was at pains to demonstrate that the Bar's price fixing scheme had in fact substantially and adversely affected interstate commerce (421 U.S. at 783-785), and concluded (p. 785):

> ". . . Of course, there may be legal services that involve interstate commerce in other fashions, *just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.*"

II. Schwinn's per se Rule of Territorial Restriction Should Not Be Applied to the Distribution of Daily Newspapers.

The ruling below about interstate commerce rests on a conclusion that the supposed restraint was unreasonable *per se,* and this in turn was rested by the court on *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365 (1967). The court stopped its ears to realities and to the necessities of newspaper distribution because it viewed *Schwinn* as compelling it to do so. To all the evidence about the

need for orderly distribution in the newspaper business, the court below had a one-sentence reply: "In any event the argument that need for speedy delivery of perishable products justifies an exception to the *Schwinn per se* rule has been rejected whenever raised." (App. p. 12). But it has not, and ought not to be.

The meaning and reach of *Schwinn* has been a constant and vexing question. Only recently the Ninth Circuit, on rehearing *en banc* in *GTE Sylvania, Inc. v. Continental T.V., Inc.,* ..... F.2d ....., 1976-1 Trade Cases ¶ 60,848, split 7 to 4 about what *Schwinn* means and requires, and held that, in the circumstances of that case, *Schwinn* did not mandate a *per se rule.* A little earlier, in *Tripoli Co. v. Wella Corp.,* 425 F.2d 932 (1970, *en banc*), cert. denied, 400 U.S. 831, the Third Circuit also rejected the view that *Schwinn* laid down a cast iron *per se* rule. In *Tripoli* a distributor of potentially dangerous hair preparations was terminated because it refused to limit its resales to professional beauticians. A mechanical *Schwinn* argument was rejected, the court saying (425 F.2d at 936):

> "That case [*Schwinn*] does not, as plaintiff proposes, establish as a per se violation every attempt by a manufacturer to restrict the persons to whom a wholesaler may resell any product whatsoever, title to which has left the manufacturer. Rather, *Schwinn* must be read, as must all antitrust cases in its factual context. That context is a restraint on the territories in which and the retailers to whom a wholesale purchaser may resell a bicycle, a product so simple to use that most ultimate consumers are children."

Tripoli and the decision below are in direct conflict.

Similarly, in *Copper Liquors v. Adolph Coors Co.,* 506 F.2d 934 (1975), the Fifth Circuit observed that the circumstances of the business before it presented a "tempting invitation" to adopt the rule of reason analysis of *Tripoli v. Wella Corp., supra,* but reluctantly declined because of the price fixing aspects of the case.

In *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Commission had expressly declined to invoke what it called the "technical formula" of *Schwinn*, and instead evaluated the substance of the alleged restriction in the context of the particular facts of the industry. (405 U.S. at 247, n. 6)[6]

Schwinn itself recognizes that "confinement of distribution . . . may be permissible in an appropriate and impelling competitive setting." 388 U.S. at 379. And despite passages in *Schwinn* that appear strait and encompassing, it is elementary law that every opinion must be read in light of the facts of the case, *German Alliance Ins. Co. v. Home Water Co.*, 226 U.S. 221, 234 (1912) and no more so than in Sherman Act cases. As said in *Maple Flooring Ass'n. v. United States*, 268 U.S. 563, 579 (1925):

> "This Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts . . ."

So it must be with the *Schwinn* decision. In *GTE Sylvania, Inc. v. Continental TV, supra,* ..... F.2d ....., 1976-1 Trade Cases ¶ 60,848, the court below, in interpreting and applying *Schwinn*, made that very observation and quoted the passage from the *Maple Flooring* case. In *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), the Court admonished (pp. 132-3):

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of the cases not before the Court. *General expressions transposed to other facts* are often misleading."

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6. Although the Commission was proceeding under Section 5 of the Trade Commission Act, 15 U.S.C. ¶ 45, its approach was precisely the rule of reason analysis rejected below.

If there ever was a case where the realities of the business—the facts of life—should prevail over the doctrinaire, this is it. And bearing in mind the importance to a democracy of unimpeded newspaper circulation, nowhere is a doctrinaire application of law less warranted. A rule of law that the distribution of daily newspapers is conclusively governed by ancient rules respecting the passage of "title" and "restraints on alienation" applicable to the distribution of ordinary commodities is, to borrow a phrase of Mr. Justice Frankfurter, "mechanical jurisprudence in its most glittering form." *Bindczyck v. Finucane*, 342 U.S. 76, 85 (1951). Technically "title" may have passed to Noble, but as to any unsold papers he had "title" for but a few hours, because they were returnable to McClatchy for full credit. The property to which a "title" adheres, an afternoon daily newspaper, comes into existence about 2:00 P.M. and ceases to exist, as a salable item, shortly after the sun goes down.

Only one case cited in the opinion below had anything to do with daily newspapers, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). Decided eighteen months after *Schwinn*, this Court in *Albrecht* carefully avoided blanket *per se* condemnation of territorial restrictions in the newspaper business, confining its remarks on that subject to the facts of the case, where the territorial restrictions were part and parcel of a larger and patently unlawful price-fixing scheme. (390 U.S. at 154). No greater friend of antitrust enforcement has sat on the Court than Mr. Justice Douglas, and, concurring in *Albrecht*, he called attention to the significance of the price-fixing element, thus (390 U.S. at 154-156):

> "This is a rule of reason case stemming from *Standard Oil Co. v. United States*, 221 U.S. 1, 62. Whether an exclusive territorial franchise in a vertical arrangement is *per se* unreasonable under the antitrust laws is a much mooted question. A fixing of prices for resale is conspicuously unreasonable, because of the great leverage that price has over the market. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221.

> The Court quite properly refuses to say whether in the newspaper distribution business an exclusive territorial franchise is illegal.
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> * * *
>
> "Under our decisions, the legality of exclusive territorial franchises in the newspaper distribution business would have to be tried as a factual issue, and that was not done here."

The local distribution of daily newspapers bears no resemblance whatsoever to the national distribution of bicycles or any other, ordinary goods. To sell bicycles it is not necessary that tens of thousands of bicycles be manually and individually delivered, seven days a week, by hundreds of different persons, mostly school children, to thousands of different specific locations, every evening or morning at a precise time. But without such distribution there could be no daily newspapers. To sell bicycles it is not necessary that a bicycle have been manufactured only a few hours before its final sale. But a daily newspaper is the most perishable commodity known. It cannot be stored, remodeled or refurbished; in a matter of hours it is scrap. Bicycles are not delivered by a veritable battalion of persons carrying them about, block by block. An adult, or boy or girl, can carry only so many papers in the short time available. Bicycles are also not delivered by boys and girls who throw them on a subscriber's roof or into his shrubbery, or who sometimes do not throw them at all. But when the paper is missing, the subscriber calls the publisher, and *the publisher must know who is responsible for each delivery* so that readers are not lost. To sell bicyces it is not necessary that the bicycle carry advertising, which must reach the purchaser at a particular time. But such advertising and its timely delivery are essential to a newspaper's existence.

Without exception, the testimony of every witness, including both Noble and his expert, recognized that the distribution of newspapers requires *some* form of ordered, territorial system.

Noble himself desired specific, precise boundaries and unsuccessfully complained to the *Bee* to obtain them. (App. pp. 24-25) Noble's expert, Rothman, with fifty-five years' circulation experience at five different newspapers, testified that it is a common practice, all over the United States, to have carrier boys and girls, as well as wholesale distributors, assigned to routes or areas. The reasons are always the same, *viz.*, the time element, and the necessity of an orderly system of distribution. Boy or man, "he had just so many things that he could do and so many miles that he could cover and so many places he could go." Some orderly method of distribution is required. Every distributor must know where he is to go, and the publisher must know who is responsible for the delivery of each individual paper. (App. pp. 30-35).

In every newspaper office in the United States, there is and must be a map, route list or similar record which identifies the areas, routes or customers for which a particular distributor or carrier is responsible. In every newspaper in the United States still employing the services of independent carriers, there are carriers who limit their distribution to the routes for which they are responsible, if for no other reason than that school adjourns at 3:00 P.M. and the youngster must have done his route and be washed and ready for dinner by 6:00 P.M. And in every newspaper in the United States there are repeated discussions concerning the size of areas which can be properly serviced by a single individual.

The opinion of the Court below thought it surprising that McClatchy claimed that an orderly system of distribution is essential while submitting that it did not impose territorial restrictions on its distributors (App. p. 12). The point is that if the law permits a jury to draw an inference of territorial restrictions from facts essential to orderly distribution, like areas of primary responsibility and route lists, where in fact no restriction is specified, then a *per se* rule is particularly doctrinaire and indefensible.

No case cited by the court below supports it. Some involved horizontal restrictions,[7] others price fixing, as already noted. In the end, the decision below rests on a rigid reading of *Schwinn,* a reading rejected by the court below sitting *en banc* in the *Sylvania* case, by the Third Circuit in *Williams v. Independent News Co.,* 485 F.2d 1099 (1973), by the Third Circuit *en banc* in *Tripoli v. Wella Corp.,* 425 F.2d 932, and by the Federal Trade Commission in the *Sperry & Hutchinson* case.

Only this Court can put an end to the vexing differences about what *Schwinn* commands. Even judges who have been unable to read *Schwinn*'s words other than rigidly have raised their voices. For example, Judge Duniway, dissenting in the *Sylvania* case, said (1976-1 Trade Cases, at p. 68,742):

> "I dissent solely on the ground that . . . Schwinn . . . is squarely in point . . . . I cannot, however, refrain from making one small observation. I am puzzled by the notion that because courts are not very well equipped to decide between conflicting notions of economic policy, they should pick one side of such an argument and erect it into a rule of per se illegality."

Just this month, in *Cantor v. Detroit Edison Co.,* ..... U.S. ..... No. 75-122 (July 6, 1976), the plurality opinion quotes approvingly from *Appalachian Coals, Inc. v. U.S.,* 288 U.S. 344, 360 (1933):

> "The restrictions the [Sherman] Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis."

7. *United States v. Topco Associates,* 405 U.S. 596 (1972), cited at App. pp. 9-10, 12, involved a *horizontal* division of territories, and thus rested upon quite different principles settled long before *Schwinn.* See 405 U.S. at 608-609. The same is true of *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894 (5 Cir. 1973), cited at App. B, p. 14.

In *Fairfield County Beverage Distributors v. Narragansett Brewing Co.,* 378 F. Supp. 376 (D.Conn. 1974) (App. p. 11), the court was prepared to evaluate the restrictions by application of rule of reason but then concluded that Connecticut's liquor laws placed defendant's conduct beyond the reach of the Sherman Act. 378 F.Supp. at 379-380.

III. A Trial Court Should Be Free, in the Exercise of a Sound Discretion, to Inform the Jury That the Award, Which Is to Be Measured by Actual Damages, Will Be Trebled by the Court.

May the trial judge inform the jury, in an action for damages under the antitrust laws, that its award of actual damages will be trebled? On this question, on which there is conflict among the circuits, everything that can possibly be said on either side can be summarized tersely.

On a plaintiff's side, it is argued that if the trial judge tells the jury that its award will be trebled, the jury will return a verdict for less than actual damages in recoil from the prospect of an enlarged judgment, even though, as here, it is instructed that its award must be for actual damages. Therefore, it is urged, the jury will defeat the beneficent purposes of the statute. That is the view of the court beow, and of the Fifth and Tenth Circuits. *Pollock & Riley, Inc. v. Pearl Brewing Co.,* 498 F.2d 1240 (5 Cir. 1974); *Semke v. Enid Automobile Dealers' Ass'n.,* 456 F.2d 1361 (10 Cir. 1972).

On the defendant's side, it is argued that jurors do not live in a vacuum, that they have heard that antitrust cases involve treble damages, and that, unless advised that the function of trebling is for the court, they will return a verdict for treble what they determine to be actual damages, so that, after trebling by the court, the judgment will be for ninefold actual damages. Therefore it is necessary that the jury be fully instructed on the respective func-

tions of judge and jury. That is the view of the Second Circuit, *Bordanaro Bros. Theaters, Inc. v. Paramount Pictures, Inc.*, 203 F.2d 676 (1953), and of a multitude of district courts who sit on the firing line and are in touch with day-to-day actualities.[8] This has been called "the overwhelming weight of authority and, it is believed, the better view". Timberlake, Federal Treble Damage Antitrust Actions ¶ 19.06, p. 280.

The resolution of the conflict must lie in a basic premise that *has to be accepted* if the jury system is to survive. The jury system is intolerable unless the law makes the basic non-traversable assumption that the jurors will honestly and conscientiously discharge their duty and follow the law as it is told to them by the court. As said in *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957):

> "... Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice."

The rule of the court below assumes that the jury will defy the law, although told what it is, and substitute its own views of public policy for that of Congress. A jury cannot follow the law if any part of the pertinent law is concealed from it. Just as a witness must tell, not only the truth, but the whole truth, just as famous 10(b)(5) recognizes that a statement true as far as it goes may still mislead unless something more is added, the jury is entitled

8. See e.g., *Cape Cod Food Products v. National Cranberry Ass'n.*, 119 F.Supp. 900, 911 (D.Mass. 1954); *Viking Theater Corp., v. Paramount Film Distributing Corp.*, 1961 Trade Cases ¶ 70,051 (E.D.Pa., citing over a dozen unreported decisions to the same effect); *Village Theatres, Inc. v. Paramount*, (D.Utah 1957, unreported, court's instruction quoted in Timberlake, *supra*, p. 282).

to know all the pertinent law. Thus an experienced trial judge, Judge Gray sitting below by designation, dissenting on this issue, said (App. pp. 18-19):

> "... I think that the trial court should 'level' with the jury and make sure that the members thereof understand the respective responsibilities of jury and court with respect to damages, just as the trial judge in this case did.
>
> "Jurors, like other citizens, are entitled to know what the law is, even with respect to damages in antitrust cases; presumably, many of the people who serve on juries have some awareness in these matters. If no explanation is given as to who does the multiplying by three, the jury might well assume that the responsibility is theirs and thus do it without anyone becoming aware that the "damages" have already been trebled. A judge fixes damages in an antitrust case in full knowledge that the amount will be tripled; I see no valid reason why we should try to conceal from a jury the ultimate effect of their verdict."

In earlier days, when private treble damage actions were relatively rare, a judge might have rationally supposed that jurors were unaware of the tripling feature of the statute. That time has long passed. Today antitrust cases are commonplace.[9] Many involve famous athletes, and are regularly and widely reported in the news media and the sports pages.[10] Current facts, both shown by the record here and judicially known to this Court, demonstrate that the only realistic view is that "Whether or not the jury is

9. The year 1962 saw the filing of 1,739 treble damage actions in the electric industry cases alone. Other filings amounted to 283 in 1963, and increased to 536 filings in 1967. See *National Institute on Treble Damage Litigation*, 38 Antitrust L.J. 4-5 (1968). And as of June 30, 1970, there were 344 private antitrust cases pending in the Northern District of California alone. *Annual Report of the Director, Administrative Office of the United States Courts* for the fiscal year ended June 30, 1970.

10. E.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); *Haywood v. National Basketball Ass'n.*, 401 U.S. 1204 (1971); *Kapp v. National Football League*, 390 F.Supp. 73 (N.D.Cal. 1974); *Blalock v. Ladies Professional Golf Ass'n.*, 359 F.Supp. 1260 (N.D.Ga. 1972).

explicitly informed of the [treble damage] provision's existence, it is unreasonable to assume that they will not learn of it anyway during trial." *Note,* 80 Harv.L.Rev. 1566, 1569 (1967).

San Francisco, where this case was tried, has over the years been the scene of many antitrust cases. When this case was being tried, the electric industry antitrust cases were again daily fare in the news, for then San Francisco Mayor Alioto was on trial in the State of Washington over fees received in that litigation. Scarcely three weeks before the jury was selected in this case, the following appeared in the *San Francisco Chronicle:*

"TESTIMONY BEGINS IN
ALIOTO TRIAL

> "Alioto, O'Connell and Faler are being sued for recovery of $2.3 million in legal fees paid Alioto in the mid-'60s for prosecuting a series of *treble damage antitrust suits* against large electrical manufacturers." (App. pp. 35-36)

Just two weeks before jury selection, the San Francisco *Chronicle* had reported:

"SUIT FILED IN TRADING
STAMP WAR

> "A $10 billion antitrust suit, charging racial slurs, was filed in federal court here yesterday . . .
>
> "The suit asks for $160 million actual damages from each defendant which, *when trebled,* is $10,080,000,000. *In antitrust suits, if damages are proved, the damages are automatically trebled.*" (App. pp. 36-37)

In his opening statement, Nobel's counsel reminded the jury of newspaper accounts of antitrust cases. App. p. 22. At that very moment another jury in the same courthouse was returning a verdict in *Ford Wholesale Co. v. Fibreboard Paper Products Co.,* N.D.Cal. No. 45977-WJS, and Noble's counsel thus invited the jury to read the *San Francisco Chronicle's next morning's* report of that verdict:

"$300,000 AWARD IN
TRUST SUIT

> "A jury yesterday awarded a judgment of $300,000 to Ford Wholesale Co., Inc., San Jose, in its *treble-damage* trade restraint suit against Fibreboard Paper Products Co." (App. p. 36).

In this case the trial judge clearly explained to the jury the public purpose of the private antitrust suit, instructing (App. pp. 38-39).

> "The private cause of action was intended by Congress to serve the dual purpose of permitting those injured by violations of the antitrust laws to recover damages and to aid the United States Government in enforcing the antitrust laws.
>
> In authorizing private remedies for persons injured by infractions of the antitrust laws, Congress intended to provide not only for private redress in damages, but also to secure more effective enforcement of antitrust legislation.
>
> The private antitrust action is a sanction granted to private—to a private plaintiff as distinct from the United States Government because of the public interest. It is clear that Congress imposed the penalty of treble damages on violators of the antitrust laws in order to deter other violators of the antitrust laws and to supply an ancillary force of private attorneys general to supplement the United States Department of Justice Antitrust Division in the enforcement of the Federal antitrust laws."

The court also instructed that "your function is to determine as accurately as you can from the evidence which you have heard the amount of compensation which will actually compensate the plaintiffs for any injury to their business or property, no more, no less." App. p. 39. To deny the court the power then to tell the jury that the court would do the trebling, for fear that the jury would flout the law, does a disservice to the jury system.

We need not go so far as to urge that an antitrust defendant is automatically entitled to such an instruction. But the trial court, whose first-hand familiarity with all the circumstances can never be fully imparted in a cold appellate record, should not be stripped of all discretion in the matter. Certainly, when a plaintiff's counsel invites the jurors' attention to newspaper accounts, a trial judge is warranted in assuring that the jury receives the law from the court and not from the newspapers, just as judges must assure that criminal defendants are tried on evidence presented in open court and not in the newspapers. E.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965).

CONCLUSION

We respectfully submit that the petition should be granted.
Dated: San Francisco, California, July 20, 1976.

MOSES LASKY
RICHARD HAAS
GEORGE A. CUMMING, JR.
Attorneys for Petitioners

[Appendices follow]

Appendix A

United States Court of Appeals
for the Ninth Circuit

WILLARD M. NOBLE and ETTA M. NOBLE, *Plaintiffs-Appellees,* vs. MCCLATCHY NEWSPAPERS, a corporation, et al., *Defendants-Appellants.*	No. 72-2021
WILLARD M. NOBLE and ETTA M. NOBLE, *Plaintiffs-Appellants,* vs. MCCLATCHY NEWSPAPERS, a corporation, et al., *Defendants-Appellees.*	No. 72-2042

OPINION

[November 14, 1975]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING and TRASK, Circuit Judges,
and GRAY,* District Judge

BROWNING, Circuit Judge:

Willard Noble and his wife, Etta, were distributors of the Sacramento Bee newspaper. Their distributorship was cancelled. They brought this private antitrust action against McClatchy Newspapers, publisher of the Bee, and seven individuals.[1]

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*Honorable William P. Gray, United States District Judge, Central District of California, sitting by designation.

1. The individual defendants are three officers of the corporation, two circulation department employees, and two persons who acquired plaintiffs' route following termination of plaintiffs' distributorship.

Three claims are at issue on these appeals: First, that defendants violated section 1 of the Sherman Act to plaintiffs' injury by terminating plaintiffs' distributorship; second, assuming the lawfulness of the termination of plaintiffs' distributorship, that defendants violated section 1 of the Sherman Act to plaintiffs' injury by preventing plaintiffs from selling their distributorship after termination; and third, that defendants violated section 2 of the Sherman Act to plaintiffs' injury by monopolizing the publication of daily newspapers of general circulation in the relevant market.

The case was tried to a jury. The jury returned a verdict for defendants on claim one (the termination claim) and three (the monopolization claim), and for plaintiffs on claim two (the sale-of-business claim). Judgment was entered in favor of plaintiffs on the sale-of-business claim in the amount of $63,333.04—$15,000 in damages, trebled, costs and attorneys' fees of $18,333.04.

Defendants appeal the denial of their motion for judgment n.o.v. or a new trial on the sale-of-business claim. Plaintiffs appeal the denial of injunctive relief with respect to this claim. They also urge that errors in jury instructions and rulings on evidence infect the judgment as to the termination and monopolization claims, and seek a new trial on these claims if defendants succeed in their appeal of the judgment as to the sale-of-business claim.

BACKGROUND FACTS

Willard Noble was an independent city newsstand distributor for the Sacramento Bee from October 1, 1960, to July 1, 1969, under three contracts with McClatchy Newspapers. Etta Noble was a party to the third of these contracts, entered on April 18, 1969.

Under the distributorship contracts, plaintiffs were responsible for sale and distribution of the Bee in an area referred to as "Newsstand #5," encompassing a portion of the City of Sacramento and its suburbs. Plaintiffs purchased daily and Sunday copies of the Bee from McClatchy Newspapers at wholesale and resold them from newspaper vending racks and to retail outlets. Unsold papers could be returned at cost, but plaintiffs assumed full responsibility for copies lost through theft or other causes.

Paragraph nine of the distributorship contracts provided that if plaintiffs decided to transfer their route they would give McClatchy Newspapers sixty days' notice, that McClatchy had "the right to determine the qualifications of the proposed new distributor," and that McClatchy's consent to transfer "shall be required, and will not be unreasonably withheld."[2] Paragraph eleven provided that the contract "may be cancelled by either party at any time upon thirty days prior written notice to the other party."

By letter dated May 27, 1969, McClatchy Newspapers cancelled plaintiffs' distributorship effective July 1, 1969. The reason for this action was disputed. Plaintiffs contended their refusal to agree to split their distributorship territory "was a substantial factor in causing [McClatchy] to terminate them." Defendants contended that the distributorship was terminated because of Willard Noble's "continued stream of complaints" regarding such matters as late delivery of papers and McClatchy's refusal to compensate distributors for theft losses."[3]

---

2. Paragraph nine was added to the city newsstand distributors' contracts in the spring of 1969, at the request of the distributors. Defendant Byron Conklin, circulation manager of the Bee, testified there never had been any "prohibition against selling a distributorship." Wentworth Kilgen, associate house counsel for McClatchy, testified that he approved the addition of paragraph nine to the contract because it was the "natural consequence" of the law "that a person can sell any asset that he has unless there is some restriction preventing him from doing so." He also stated "there was nothing to prevent the transfer of the distributorship under the previous contract, because there was no restriction against it."

3. Defendants did not question Noble's competency as a distributor. Defendant Conklin testified that Noble was "very circulation conscious," that he "worked very hard to service his dealership," and that he "did

According to defendants, the difficulties with Noble came to a head during a telephone conversation between Noble and defendant Carlo Bua, assistant circulation manager. Bua testified that the conversation "started as a griping session" during which Noble complained "about the thefts of his papers, the late papers, he couldn't get qualified help, and so forth and so on." Noble questioned whether the Bee was properly accounting for theft losses in reporting its circulation to the Audit Bureau of Circulation, an independent organization whose audits of publishers' circulation statements are heavily relied upon by advertisers. Noble also said he believed the distributorship contract was illegal insofar as it forbade bulk sales of unsold copies of editions that contained advertising discount coupons.[4] Bua "mentioned" that the solution to Noble's problems would be to split his distributorship. Noble replied that "under no circumstances would he want to split his distributorship."[5] Bua reported the substance of the conversation to defendant Byron Conklin, the circulation manager.

a hell of a job" for the Bee. Defendant Carlo Bua, assistant circulation manager, testified that Noble was a "knowledgeable, experienced newspaper distributor." During Noble's nine years of service circulation of the Bee in Newsstand 5 increased approximately fourfold.

4. The bulk sale problem concerned McClatchy because of complaints by advertisers that unusually high percentages of coupons were being returned for redemption, including many they believed had not been used to purchase the advertised products. Noble admitted that in late 1967 or early 1968, he made bulk sales of about 5,000 copies of the Bee containing discount coupons, but claimed these sales were made with Conklin's knowledge and approval to reduce theft losses. Conklin denied this. Noble testified that in May 1968 Bua admonished him to stop selling in bulk, and he complied. Conklin subsequently informed the city newsstand distributors that bulk sales of editions with coupons would be cause for termination. Still later, in April 1969, distributor contracts were revised to provide that "sale of editions containing advertising coupons will not exceed the normal demand for single copy sales of such editions and that [the distributors] will not sell in bulk for purposes of abnormal use of said coupons."

5. Bua and Conklin admitted they had "suggested" to Noble on a number of prior occasions that he split his territory. They testified these suggestions were merely "constructive advice" as to how Noble might eliminate the problems he complained of.

Conklin testified that Noble's complaints were "the straw that broke the camel's back"; his "patience was exhausted." He consulted his supervisor, O. J. Brightwell, business manager of the Bee, explaining that "his department was no longer able to get along with Mr. Noble," and recommending that he be terminated. Brightwell agreed. The cancellation letter was sent the following day.

A few days later Conklin told Bua, "now is the best time to split Newsstand 5." He instructed Bua "to find a satisfactory boundary line." Noble asked for reinstatement. Conklin refused. Noble asked if he could sell his distributorship. Conklin said "he had nothing to sell," and in any event McClatchy had plans to split the distributorship. Noble asked that he be allowed to "retain a portion of [his] dealership if it was split." Conklin refused.

Bua decided on a two-part division of Newsstand 5. Conklin initiated discussions with defendant Gary Downing, an employee of the Bee's circulation department, about becoming a distributor in a portion of Newsstand 5. Defendant James Gallagher, the Bee distributor for Newsstand 2, requested that he be considered for the remaining portion. Downing and Gallagher entered into distributorship contracts for the divided portions of Newsstand 5, effective July 1, 1969. With the permission of McClatchy, Gallagher sold his business in Newsstand 2 for $6,000.

DEFENDANTS' APPEAL

The sole issue on defendants' appeal is whether the district court erred in denying their motion for judgment n.o.v. or new

Robert Gilliland, plaintiffs' expert on newspaper circulation practices, testified it was "in the best interests of management to keep [dealership] areas down to limited size," and if a dealer refused to split, management would "have to . . . take legal action to split the area or, quite frankly, cancel the man who won't split it."

trial on plaintiffs' sale-of-business claim.[6] We agree with defendants that the motion should have been granted.

Instructions given by the district court on the sale-of-business claim are reproduced in the margin.[7] According to these instructions the claim rested entirely upon the unlawfulness of defendants' refusal to authorize plaintiffs to sell Newsstand 5. For the purpose of this claim, lawfulness of the termination was to be

6. Plaintiffs argue that defendants waived their right to raise this issue by failing to raise it below. However, defendants challenged the sufficiency of the evidence on the sale-of-business claim in their trial brief, in their proposed instructions, in their motion for directed verdict on the sale-of-business claim, and in their brief in support of the motion for judgment n.o.v. or new trial on this claim.

7. The relevant instructions, requested by plaintiffs, read:

> The [second] claim in this case is that the plaintiffs . . . contend that they were injured by reason of defendants' alleged violation of Section 1 of the Sherman Act, in that defendants refused to permit plaintiffs to sell and transfer their newspaper distribution business known as Newsstand No. 5, as plaintiffs contend that they were entitled to do so pursuant to their ownership of said business.
>
> I will refer to this claim as the sale of business claim.
>
> This sale of business claim is a different claim from the territorial claim which I have just instructed you on. This sale of business claim is made by both plaintiffs and is irrespective of whether or not the termination of the contract was lawful; that is, plaintiffs are saying that regardless of whether or not the termination of the contract violated Section 1 of the Sherman Act, as they assert in support of their territorial restriction claim, there was another and different violation of Section 1 of the Sherman Act which caused them injury.
>
> This other and different violation of Section 1 claimed by the plaintiffs is that after the contract was terminated there was a contract, combination or conspiracy to prevent them from selling their business, that this contract, combination or conspiracy in fact prevented them from selling their business and that this contract, combination or conspiracy restrained interstate commerce unreasonably.
>
> In order for plaintiffs to recover for this alleged violation of Section 1, plaintiffs must show that after the contract was terminated there was a contract, combination or conspiracy to prevent them from selling their business, if any, as a going concern, and that this contract, combination or conspiracy in fact prevented them from selling their business, if any, and that this contract, combination or conspiracy was in unreasonable restraint of interstate trade and commerce.

treated as irrelevant. The jury was instructed to consider the sale-of-business claim separate and apart from the termination, and "irrespective of whether or not the termination of the contract was lawful."[8] It follows that plaintiffs' recovery under the sale-of-business claim may be sustained only if there was evidence from which the jury could conclude that *after* termination plaintiffs owned a valuable asset. Such proof was lacking.[9]

Upon receipt of the letter of termination, as defendants accurately put it, "plaintiffs owned nothing but a contractual right to distribute the Bee for thirty-odd days." The witnesses who testified regarding the value of this right agreed that it was worthless.[10] Nothing in the distributorship contract purported to give

8. This portion of the instructions was necessary to enable plaintiffs to state a separate claim on the basis of McClatchy's refusal of permission to sell Newsstand No. 5 since the damage alleged under this claim and the termination claim was the same, *i.e.*, the going concern value of the distributorship.

9. We thus do not reach the following issues raised on defendants' appeal: (1) whether there was sufficient evidence that plaintiffs were prevented from selling their distributorship by a contract, combination or conspiracy that unreasonably restrained interstate commerce; and (2) whether there was sufficient evidence that defendants Eleanor and C. K. McClatchy and Walter Jones personally participated in or approved the allegedly unlawful conduct forming the basis of sale-of-business claim.

"It is well settled that a manufacturer may discontinue dealing with a particular distributor 'for business reasons that are sufficient to the manufacturer and adverse effect on the business of the distributor is immaterial in the absence of any arrangement restraining trade.'" *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119 (9th Cir. 1972), *quoting Richetti v. Meister Brau, Inc.*, 431 F.2d 1211, 1214 (9th Cir. 1970). Allowing plaintiffs in the present case to recover antitrust damages on the sale-of-business claim after losing the termination claim would in effect reverse the well settled law on the antitrust implications of distributorship terminations. Allowing plaintiffs to recover on the sale-of-business claim after winning on the termination claim would be to permit duplicative recovery.

10. This was the opinion of defendants and other representatives of McClatchy. It was shared, however, by one of plaintiffs' experts, Robert Gilliland, and by two distributors who testified on behalf of plaintiffs. It also appears to have been the view of plaintiffs' counsel as reflected in the following exchange with defendant Gallagher:

plaintiff a right to sell, after termination, as if termination had not occurred.[11] There was no evidence of a trade practice to this effect.[12] The only reasonable conclusion the jury could draw from the record was that no damage had been shown under the sale-of-business claim. *See Chisholm Bros. Farm Equip. Co. v. International Harvester Co.*, 498 F.2d 1137, 1139-40 & n.5 (9th Cir. 1974). The insufficiency could not be cured by retrial; accordingly, the district court erred in refusing to grant the defendants' motion for judgment n.o.v.[13]

PLAINTIFFS' CROSS-APPEAL

Because plaintiffs' judgment on the sale-of-business claim must be reversed, we consider plaintiffs' contention that they are entitled to a new trial on the termination and monopolization claims because of alleged errors in the jury instructions and in the admis-

Q. And you do know that under this paragraph 11 of the contract the Bee could terminate you and you would have nothing to sell?

A. That's true.

11. The distributorship contract involved in *Albrecht v. Herald Co.*, 390 U.S. 145, 148 (1968), provided that if the contract were terminated the distributor would have 60 days to provide a satisfactory purchaser for his route, as the Court of Appeals pointed out, 367 F.2d 517, 519 (8th Cir. 1966).

12. It was established that terminated distributors of another newspaper, the Sacramento Union, were paid $1.00 per subscriber. But this payment was expressly provided for in the Sacramento Union's distributorship contracts. There is no similar provision in plaintiffs' contracts with McClatchy. Even under the Sacramento Union's contracts no sale of a distributorship has been made "after [a] dealer was terminated and the termination was unrescinded." The circulation manager of the Sacramento Union testified that he had twice rescinded terminations, but that the rescissions were not granted for the purpose of giving the distributors an opportunity to sell their routes.

13. For the same reasons, plaintiffs were not entitled to injunctive relief on the sale-of-business claim under § 16 of the Clayton Act, 15 U.S.C. § 26, providing such relief "against threatened loss or damage by a violation of the antitrust laws."

sion and exclusion of evidence. We conclude that a new trial is required on the termination claim.

Plaintiffs alleged that their distributorship was terminated in substantial part because they refused to accede to defendants' request that they give up a part of the territory covered by the distributorship. The district court instructed the jury as follows:

> If you should find from the evidence that defendants or some of them wished plaintiffs to agree to confine their sales of the Sacramento Bee to a particular part of Newsstand No. 5, that the plaintiffs refused to agree to this, and that their alleged refusal was a substantial factor in the termination of the contract, you must then determine whether, if plaintiffs had agreed to the arrangements, and unreasonable restraint of interstate commerce would have resulted, as a result of being a part of an alleged arrangement between the Sacramento Bee, its distributors and carriers.

Plaintiffs contend that the district court should have instructed the jury that an agreement to restrict the terriory in which newspapers purchased from McClatchy could be sold would have been a per se violation of section 1 of the Sherman Act, and it was therefore unnecessary for plaintiffs to prove an unreasonable restraint of interstate commerce would have resulted from such an agreement. Plaintiffs correctly state the law.

In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967), the Supreme Court held:

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it . . . . Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale.

The rule of *Schwinn* is unequivocal:

> Once the manufacturer has parted with title and risk, he has parted with dominion over the products, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act.

388 U.S. at 382.[14]

Although the wisdom of per se rules with respect to territorial restraints has been the subject of substantial commentary,[15] the Supreme Court has adhered to *Schwinn* and, indeed, has expanded its prohibition. In *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Court held that horizontal as well as vertical territorial restraints were unlawful per se, rejecting the trial court's conclusion that the anticompetitive effect of a territorial restraint on intrabrand competition was outweighed by the increased ability

14. The opinion in this case deals only with the precise type of territorial restriction involved in *Schwinn*. We intimate no view whatever as to the rule to be applied to other dealer restrictions such as the location clauses involved in *GTE Sylvania, Inc. v. Continental T.V., Inc.*, No. 71-1705, now under submission to the court in banc.

15. *See, e.g.*, Averill, *Sealy, Schwinn and Sherman One: An Analysis and Prognosis*, 15 N.Y.L.F. 39 (1969); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L.J. 373 (1966); Chadwell & Rhodes, *Antitrust Aspects of Dealer Licensing and Franchising*, 62 Nw. U.L. Rev. 1 (1967); Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 Harv. Law Rev., 1419 (1968); McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal*, 37 Antitrust L.J. 137 (1967); Zimmerman, *Distribution Restrictions After Sealy and Schwinn*, 12 Antitrust Bull. 1181 (1967); Editorial Note, *Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?*, 40 Geo. Wash. L. Rev. 123 (1971); Note, *Territorial Restrictions and Per Se Rules—A Reevaluation of the Schwinn and Sealy Doctrines*, 70 Mich. L. Rev. 616 (1972); Note, *United States v. Arnold, Schwinn & Co.—Vertical Customer and Territorial Restrictions and the Sherman Act*, 63 Nw. U.L. Rev. 262 (1968); Comment, *The Impact of the Schwinn Case on Territorial Restrictions*, 46 Texas L. Rev. 497 (1968); Case Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 Wash. & Lee L. Rev. 457 (1971).

of dealers in Topco-brand products to compete in the inter-brand market. In justifying the per se approach in this area, the Supreme Court said (405 U.S. at 609-10):

> The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against preservation of competition in another sector is one important reason we have formulated *per se* rules.

The Court noted (405 U.S. 609-10 n.10):

> Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.

As the Fifth Circuit recently observed: "[W]e must accept the fact that the Court has set its face against both horizontal and vertical territorial restrictions with the possible exception of vertically imposed restrictions by 'new entrants' and 'failing companies' briefly mentioned in *Schwinn*." *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 943 (5th Cir. 1975).[16]

Defendants contend that application of *Schwinn* to the distribution of newspapers will be destructive of an orderly system essential to timely delivery of perishable news and advertising. There is nothing to indicate that independent distributors, their livelihood at stake, would fail to make timely delivery unless competition among them were eliminated by territorial restrictions. Lawful means less restrictive of intrabrand competition are available

16. Policy arguments against the *Schwinn* per se rule are examined and rejected by Judge Wisdom in an extensive footnote. 506 F.2d at 941-43 n.5.

if required to assure effective distribution.[17] Defendants' argument of necessity is particularly surprising in view of their equally vigorous insistence that they did not impose territorial restrictions on their distributors.

In any event the argument that need for speedy delivery of perishable products justifies an exception to the *Schwinn* per se rule has been rejected whenever raised. *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1187 (10th Cir. 1974); *Fairfield County Beverage Distributors, Inc. v. Narragansett Brewing Co.*, 378 F.Supp. 376, 378 (D. Conn. 1974); *cf. Copper Liquor, Inc. v. Adolph Coors Co., supra*, 506 F.2d at 947. In *Albrecht v. Herald Co.*, 390 U.S. 145, 153-54 (1968), a price-fixing case involving an independent newspaper distributor, the Supreme Court indicated that the *Schwinn* per se rule would be held applicable to just such a case as this.[18]

In *Adolph Coors Co. v. FTC, supra*, the Court of Appeals for the Tenth Circuit reluctantly applied *Schwinn* to the distribution of a perishable product, expressing the hope that "the Supreme Court may see the wisdom of grafting an exception to the *per se*

17. The decree on remand in *United States v. Topco Associates, Inc., supra*, allowed creation of territories of primary responsibility, so long as the device was not used directly or indirectly to achieve or maintain territorial exclusivity. *United States v. Topco Associates, Inc.*, 1973 Trade Cas. ¶¶ 74,391, 74,485 (N.D. Ill.), *aff'd mem.*, 414 U.S. 801 (1973). *See also White Motor Co. v. United States*, 372 U.S. 253, 271-72 & n.12 (1963) (Brennan, J., concurring).

18. The Court stated:

> Certainly on the record before us the Court of Appeals was not entitled to assume, as its reasoning necessarily did, that the exclusive [territorial] rights granted by [the newspaper] were valid under § 1 of the Sherman Act, *either alone or* in conjunction with a price-fixing scheme. *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 373, 379 (1967). The assertion that illegal price-fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive. If, as the Court of Appeals said, the economic impact of territorial exclusivity was such that the public could be protected only by otherwise illegal price-fixing itself injurious to the public, the entire scheme must fall under § 1 of the Sherman Act. (Emphasis added).

rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason." But an exception to *Schwinn* based upon asserted uniqueness of product would be difficult to administer, and would introduce an element of uncertainty the per se rule was intended to eliminate. *United States v. Topco Associates, Inc., supra*, 405 U.S. at 609 n.10. As we read the *Schwinn* opinion, manufacturers may avoid the per se rule only by vertical integration or adoption of agency or consignment methods of distribution.[19] Manufacturers who wish to enjoy the advantages of distribution through independent entrepreneurs must be prepared to accept the burdens of *Schwinn*.

Manufacturers have a significant incentive to distribute their products through independent contractors rather than through employees, agents or consignees. Use of independent distributors avoids the substantial investment, expense, and risk incident to alternate methods of distribution.

The record in this case reflects other benefits. Paul Rothman, former circulation director of the Sacramento Union, testified, "the cost factor to have salaried employees in place of dealers

19. *Schwinn* approved a "rule of reason" approach to territorial and customer restraints imposed on agents or consignees of the manufacturers. The Court said, 388 U.S. at 380:

> Where the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer, it is only if the impact of the confinement is 'unreasonably' restrictive of competition that a violation of § 1 results from such confinement, unencumbered by culpable price fixing.

We reject defendants' suggestion that plaintiffs' distributorship was analogous to the agency and consignment situations referred to in *Schwinn*. The distributorship contract expressly provided that the distributor was to be "an independent wholesale distributor and not . . . an employee." Conklin testified that plaintiffs were "dealt with as independent contractors," and the record establishes that plaintiffs in fact operated on this basis. They purchased their own trucks and equipment and hired their own employees. They agreed "to purchase" the Bee. Defendants concede that plaintiffs acquired title to the copies purchased. Plaintiffs could return unsold copies at cost, but assumed the full and substantial risk of loss from theft and other causes.

would represent two and a half or more times outlay for the publisher." The difference, Rothman explained, is that "a dealer works seven days a week," usually with the help of other family members, and "takes care of his own transportation and equipment."[20] Robert Gilliland, plaintiffs' expert on newspaper circulation practices, testified that in addition to these obvious economic benefits, independent distributors are "normally a harder working group of people and . . . have a more serious concern about the operation than a salaried employee."

Because of such advantages to manufacturers, independent distributors continue to survive, and bring to the public the benefits of added competition in the distribution of goods and services. These benefits would be lost if manufacturers could obtain the private economic benefits of a system of distribution through independent businessmen, and at the same time restrict the freedom of such independent businessmen to compete. It was to prevent the wholesale destruction of this opportunity for competition that *Schwinn* forbade manufacturers to control the disposition of products after sale. "To permit this would sanction franchising and confinement of distribution as the ordinary instead of the unusual method which may be permissible in an appropriate and impelling competitive setting, since most merchandise is distributed by means of purchase and sale." 388 U.S. at 379.

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20. Rothman testified:

A. Well, a dealer works seven days a week, because it's his business. His wife usually takes care of his books. If he has a couple of boys they carry a paper route. If it was an employee setup, they would be working five days a week, forty hours a week, and you would have to have one and a third man for each dealership plus the fact that you would have to have a relief man for it, plus the fact that anytime that they worked beyond that forty hours, and this dealership is practically a twenty-four hour affair, in case of an emergency, why, you would have to pay all that overtime, plus the fact that you would have to supply trucks, vehicles of all kinds, where the dealership, the dealer takes care of his own transportation, plus the fact that you would have to buy or print all your various forms which the dealer either pays for now or buys it himself.

Defendants contend there was no factual basis for a *Schwinn* instruction, because plaintiffs failed to establish that a split of their territory would have resulted in the imposition of a territorial restraint. Plaintiffs' distributorship contract did not define the boundaries of Newsstand 5, and did not expressly forbid plaintiffs from selling the Bee in areas other than Newsstand 5. Bua described the geographical boundaries of the city newsstand distributorship as areas of "primary responsibility," and on cross-examination Willard Noble answered in the affirmative when asked, "Now, as you understand it, this contract gave you an area of primary responsibility; did it not?" From this defendants argue that as a matter of law, no territorial restrictions existed.

The absence of an express territorial restriction is not fatal to plaintiffs' claim. There is no magic in the label "area of primary responsibility." It is enough if the restriction existed in fact, whether the product of an express or tacit understanding. *See United States v. Arnold, Schwinn & Co., supra*, 388 U.S. at 382; *Hobart Brothers Co. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 900 (5th Cir. 1973); *Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21, 28 (9th Cir. 1971); Zimmerman, *Distribution Restrictions After Sealy and Schwinn*, 12 Antitrust Bull. 1181, 1187-88 (1967). *But see Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637, 639 (10th Cir. 1973).

The jury could have inferred the existence of a tacit understanding from the evidence of numerous "suggestions" to plaintiffs that they split their territory, and from the testimony of Gallagher and two other city newsstand distributors that they always stayed within their assigned territories. *See Beverage Distributors, Inc. v. Olympia Brewing Co., supra*, 440 F.2d at 30. Willard Noble testified that there were "some fuzzy areas" at the boundaries of Newsstand 5, and admitted that he had unsuccessfully sought to have his "boundary lines spelled out." Nevertheless, the boundaries were sufficiently definite that at trial Bua was

able to outline all city newsstands on a street map of the Sacramento area. When plaintiffs' distributorship was split following termination, Bua marked out the boundaries of the two new distributorships on a map in his office. Bua exhibited this map to defendants Gallagher and Downing, plaintiffs' replacements. Gallagher testified that he knew the area he was going to take over "in terms of its definition by street boundaries."

The jury could have found, therefore, that the proposed division of plaintiffs' distributorship would have involved the imposition of a territorial restraint. There was also sufficient evidence that plaintiffs' refusal to agree to divide their distributorship was a substantial factor in their termination. Thus, the jury may have based the verdict for defendants upon a finding that the territorial restraint was not an unreasonable burden on commerce. Since under *Schwinn* the jury should have been instructed that such territorial restrictions are per se unreasonable, the judgment for defendants on the termination claim must be reversed and remanded for a new trial.

We do not agree with plaintiffs that a new trial is also required on the monopolization claim. Plaintiffs complain because the court instructed the jury that plaintiffs must prove that defendants "willfully acquired or willfully maintained monopoly power" *and* "had the intent and purpose to exercise the monopoly power." Plaintiffs correctly point out that while a general intent is required for actual monopolization it may be shown by proof of the willful acquisition or maintenance of monopoly power,[21] and it was improper for the court to state that both were required, as if they were independent. Although plaintiffs are technically correct, we think the redundancy was harmless.[22]

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21. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States v. Griffith*, 334 U.S. 100, 105-07 (1948).

22. It was harmless error, if error at all, to admit the published circulation reports of the Woodland Daily Democrat, the Grass Valley Union and the Colusa Sun Herald, without testimony from representatives of the newspapers that the reports were prepared in the regular course of business. The impact of the evidence was de minimis.

Two rulings of the trial court should be considered in view of the remand for a new trial. It was not error to exclude evidence that McClatchy deleted allegedly anticompetitive provisions in the distributorship contracts after plaintiffs' termination. Plaintiffs argue that "an inference of guilt or wrongdoing may be drawn," from such evidence; but it is well settled that evidence of subsequent remedial measures is not admissible to prove culpability of prior conduct. *See Boeing Airplane Company v. Brown,* 291 F.2d 310, 315 (9th Cir. 1961); Federal Rules of Evidence, Rule 407.[23]

We think it was error, however, to inform the jury that "it is the function and duty of the court in the event that you should award damages to treble that amount in the judgment." The sole function of the jury was to determine the amount of the damage actually sustained. The "probable consequence" of advising the jury of the tripling provision of section 4 of the Clayton Act, 15 U.S.C. § 15, "would be harmful—an impermissible lowering of the amount of damages." Such an instruction is an invitation to the jury to negate Congress' determination that actual damages should be trebled in order to deter antitrust violations and encourage private enforcement of the antitrust laws. *Pollock & Riley,*

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23. Plaintiffs contend that the contract changes were admissible to explain "the loss of market position by the Sacramento Bee after the filing of the lawsuit." We do not consider the merits of this argument. The evidence of the contract changes was not initially offered on this theory. Later defendants introduced an exhibit showing the Bee's circulation had declined from 1963 to 1971. Plaintiffs' counsel objected to the post-1969 figures, stating "if they are entitled to show what was happening in circulation since '69, I think we should be entitled to show that certain things were done that may have affected that circulation." Plaintiffs did not, however, re-offer proof of the contract changes.

Inc. v. Pearl Brewing Co., 498 F.2d 1240, 1242-43 (5th Cir. 1974).[24]

Defendants suggest that since jurors may be independently aware of the treble damage provision, an explanatory instruction is necessary to avoid jury confusion and the return of erroneous verdicts. "Our immediate reaction is that a district court can sufficiently instruct the jury to determine only *actual* damages. In those cases where an accidental revelation occurs, the court can give curative instructions to alleviate confusion." *Pollock & Riley, Inc. v. Pearl Brewing Co., supra,* 498 F.2d 1243 (emphasis in original; footnotes omitted).

The judgment for defendants on the termination claim is reversed and remanded for a new trial consistent with this opinion. The judgment for plaintiffs on the sale-of-business claim is reversed and remanded with instructions to enter judgment n.o.v. for defendants. The judgment for defendants on the monopolization claim is affirmed.

GRAY, District Judge, concurring and dissenting:

I am glad to concur in Judge Browning's opinion, except with respect to its holding that the trial court should make no mention of treble damages in instructing the jury. I think that the trial court should "level" with the jury and make sure that the members thereof understand the respective responsibilities of jury and court with respect to damages, just as the trial judge in this case did.

Jurors, like other citizens, are entitled to know what the law is, even with respect to damages in antitrust cases; presumably, many

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24. *Accord, Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 665-67 (5th Cir. 1974); *Standard Indus., Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 223-24 (10th Cir. 1973); *Semke v. Enid Auto Dealers Ass'n*, 456 F.2d 1361, 1370 (10th Cir. 1972); *Sablosky v. Paramount Film Distrib. Corp.*, 137 F. Supp. 929, 941-42 (E.D. Pa. 1955); *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4, 10-11 (D.D.C. 1955), *rev'd on other grounds*, 243 F.2d 418 (D.C. Cir. 1957). *But see Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, 203 F.2d 676, 678-79 (2d Cir. 1953); *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900, 911 (D. Mass. 1954).

of the people who serve on juries have some awareness in these matters. If no explanation is given as to who does the multiplying by three, the jury might well assume that the responsibility is theirs and thus do it without anyone becoming aware that the "damages" have already been trebled. A judge fixes damages in an antitrust case in full knowledge that the amount will be tripled; I see no valid reason why we should try to conceal from a jury the ultimate effect of their verdict.

Appendix B

United States Court of Appeals
for the Ninth Circuit

WILLARD M. NOBLE and ETTA M. NOBLE,
Plaintiffs-Appellees,

vs.

McCLATCHY NEWSPAPERS, a corporation, et al.,
Defendants-Appellants.

No. 72-2021

WILLARD M. NOBLE and ETTA M. NOBLE,
Plaintiffs-Appellants,

vs.

McCLATCHY NEWSPAPERS, a corporation, et al.,
Defendants-Appellees.

No. 72-2042

ORDER

[May 20, 1976]

Before: BROWNING and TRASK, Circuit Judges,
and GRAY,* District Judge

The petition for rehearing was held pending the decision in *GTE Sylvania, Inc. v. Continental T.V., Inc.*, ... F.2d ..... (9th Cir. 1976). It is now denied.

As noted in the opinion in this case (*see* note 14), this case and *GTE Sylvania* deal with different questions. This case and *Schwinn* involve the legality of restrictions upon the territory in which a purchasing dealer may resell. The majority opinion in *GTE Sylvania* considers whether "Sylvania's practice of fixing by agree-

*Honorable William P. Gray, United States District Judge, Central District of California, sitting by designation.

ment the locations from which Continental was authorized to sell Sylvania's products was illegal *per se* under Section 1 of the Sherman Act." *Id.* at ..... The majority opinion in *GTE Sylvania* approves the result reached in this case. However, it disapproves "any language in the *Noble* opinion that may be inconsistent with any of the language" in *GTE*. *Id.* at ..... n.42. Accordingly, we have reexamined the opinions in both cases. We conclude that there are no inconsistencies between them and therefore make no modification of the language of the opinion in this case.

Appendix C

Portions of the record on appeal from the United States District Court, Northern District of California, as indicated.

OPENING STATEMENT ON BEHALF OF PLAINTIFFS

"MR. FINE: Ladies and gentlemen of the jury, my name is Timothy Fine. I have already been introduced to you. I am the attorney for Willard M. Noble and his wife Etta M. Noble. I apologize that his wife is not here today. They have a small retail business in Stockton and she is minding the store while Mr. Noble is here.

"This case is an antitrust case. It is something that many times you never heard of. If you have heard of it it is something which you think of the United States Government or you think of something way beyond.

"What is an antitrust case? Well, we all know when we read the papers to a certain extent the Government's activities in this field of antitrust. But there is also a second field of antitrust outside the Government. This is a field that pertains to the commercial and business world. This pertains to the small businessmen, the middle businessman, the large businessman. The antitrust laws not only are enforced by the Government but by private parties who are in business or who have property can also avail themselves of the antitrust laws.

"There is a statute of the United States of America known as Section 4 of the Clayton Act which provides that any person who has been injured in his business or his property may sue under the antitrust laws of the United States of America. These laws are designed to maintain a free and competitive economic system. They generally have two names which you may have read about from time to time. . . ." **[1 R. 6-7]**

Excerpts of the testimony given at trial by defendant-petitioner Carlo Bua.

"MR. BERTAIN:* Q. Mr. Bua, I now show you a map purportedly published by the Gulf Oil Company pertaining to the City of Sacramento and environs and ask you whether or not you ever saw this particular document before.

"A. [By Mr. Bua]. Yes. I prepared that the day of my deposition.

"Q. That deposition was taken by me, was it not, in Sacramento?

"A. That's correct.

"Q. Did you affix to this particular document certain markings outlining the various geographical boundaries of various city newsstand distributors?

"A. I outlined the general area of the primary responsibility, yes.

"Q. I show you the reverse side. Now I would like to have you state, if you can, Mr. Bua, by reference to that particuar map that you have before you the geographical boundaries of Newsstand 5 prior to the effective date of the termination of Mr. Noble.

"A. This will be a little confusing. It's on both sides of this sheet . . .

"But mind you this is all done by memory.

"Q. Yes.

"A. His general area of responsibility was bounded on the south by the American River and west to the Interstate 880, the Freeway, up to El Camino Avenue, east to Watt Avenue, then west again to the Freeway, continuing north to Spruce Avenue."

[7 R. 837-38]

Excerpts of the testimony given at trial by plaintiff-respondent Willard M. Noble.

"Q. [By Mr. Haas]** Now, we have talked quite a bit in this case about Newsstand No. 5. That was always a vague description really; wasn't it?

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*Counsel for plaintiffs-respondents.
**Counsel for defendants-petitioners.

"A. [By Mr. Noble] Well, it had some fuzzy areas, let's put it that way, as far as the borderline.

"Q. Uh-huh. And I think you testified that when you took over from Larson, you were given a general area or description?

"A. I was given a route list.

"Q. And that was simply a list with names and addresses on it; is that what you mean by a route list?

"A. Yes. Yes.

"Q. And it was your understanding that you were going to handle the Bee in just this general area, period?

"A. Newsstand No. 5, yes.

"Q. Uh-huh. And as you saw it, this contract didn't define any area?

"A. No.

"Q. You mean what I say is correct?

"A. Yes.

"Q. And your understanding is that whenever a person felt he could sell papers, wherever a person felt he could sell papers, it was his duty to have coverage in those areas?

"A. Yes.

"Q. Now, you felt all along, did you not, that the Bee should have defined to all the dealers just where their prime responsibilities lay?

"A. Yes, I would say so.

"Q. And you have seen, as we have put into evidence here, these contracts with the Sacramento Union home delivery dealers that have maps attached to them?

"A. Yes.

"Q. But there was never any map attached to your contracts with the Bee, was there?

"A. No.

"Q. And you wanted to have definite boundary lines established; didn't you?

"A. Yes, I would say so.

"Q. And that would be so that you would know where your area of prime responsibility was?

"A. Yes.

"Q. And one of your complaints to the Bee management was that you wanted to have your boundary lines spelled out?

"A. Yes.

"Q. Uh-huh. And you wanted those lines spelled out so that everyone would know where he was supposed to go?

"A. I wanted them for my purpose. I wanted to know where I was to have the responsibility and possibly my adjoining neighbor distributor, you might say, so there wouldn't be any confusion.

"Q. But Mr. Conklin told you that he wouldn't establish any boundaries; isn't that true?

"A. He said, 'We can't.'

"Q. All right. And he was pretty definite about that?

"A. That's about all he said.

"Q. Now, as you understood it, this contract gave you an area of primary responsibility; did it not?

"A. Yes."

[13 R. 1782-85]

* * * * *

"Q. [By Mr. Haas] Now, you don't know Mr. McMann's address?

"A. [By Mr. Noble] No.

"Q. But you would telephone him?

"A. Or he would tell me.

"Q. Uh-huh. And you would call him up and say, 'Tomorrow I have got some to sell and there's like 50 cents worth of coupons in the paper'?

"A. Words to that effect.

"Q. Words to that effect, and then Mr. McMann would come by your house and make a buy?

"A. He usually, his brother.

[13 R. 1791]

* * * * *

"Q. Now, how many papers at a time would you sell to McMann under this arrangement?

"A. Oh, it's hard to say, depend on what he wanted.

"Q. Like five hundred at a time?

"A. If he wanted five hundred.

"Q. Or a thousand at a time if he wanted them?

"A. I don't believe I ever sold him that many.

"Q. And what he was particularly interested in were the papers that had a lot of coupons in them, wasn't he?

"A. Yes, supposedly.

"Q. Well, you don't have to suppose. He came around and bought them, didn't he, or he sent somebody to pick them up?

"A. Yes.

"Q. And in one of these five hundred papers transactions, this man could walk away with what, two or three thousand coupons?

"A. I don't know. I couldn't really tell that.

"Q. Well, you know how many coupons were in the paper, Mr. Noble, because you were getting that information from the Sacramento Bee.

"A. That's right.

"Q. So when I ask you if five hundred papers could have had two or three thousand coupons, you know?

"A. It could have.

"Q. Or four thousand?

"A. It could have.

"Q. What did you charge McMann for these papers?

"A. Ten cents apiece.

"Q. So if you sold him five hundred of these papers, you got fifty dollars?

"A. Yes.

"Q. A check?

"A. Cash.

"Q. Always cash?

"A. Yes.

"Q. And how did you enter that cash in your records?

"A. I put that in with my vending machine cash.

"Q. With your coin returns?

"A. With my vending machine cash.

"Q. I see.

Now, the only way in which you were restricted by the Bee in selling was the restriction that you were not to do this, to sell these papers of this kind to people of this kind; is that right?

"A. Well, this is what they requested of me.

"Q. I am saying that the only restriction on what you could do with your papers. The Bee would love it if you would go out and sell a thousand papers legitimately, wouldn't they?

"A. Oh, I imagine they would.

"Q. And the only restriction that was placed on you at any time about what you were to do with these papers was that you weren't to do this with McMann or other people like McMann?

"A. I would say yes.

"Q. Now, besides McMann, who did you make these bulk sales to and by 'bulk sales', Mr. Noble, I mean this kind of transaction, a bulk of yesterday's newspapers to somebody who wants the coupons?

"A. I believe there was a young man by the name of Jimmy. I don't know his last name because it's a long foreign name."

[13 R. 1792-95]

* * * * *

"Q. Now, you have given some testimony about selling bags of coupons—I am not talking now, about returns, I am talking about bags full of coupons; correct?

"A. Yes.

"Q. How many of these bags did you sell?

"A. Oh, I believe I told you two or three maybe. I don't remember right offhand.

"Q. Maybe three or four?

"A. Two or three.

"Q. It couldn't be three or four?

"A. Three is three. I said three.

"Q. Could it be four?

"A. I doubt it. More like two or three. It could have been, but I couldn't swear to it, so I won't—

"Q. You couldn't swear whether it was three or four?

"A. No.

"Q. Could you swear that it wasn't five?

"A. No.

"Q. Or six?

"A. No."

[13 R. 1810-11]

* * * * *

"Q. Now, from whom did you physically receive these bags of coupons?

"A. I know of one time that I received them from my driver, Mr. William Harran or Robert Harran.

"Q. I want you to be sure you understand my question.

I am talking about the name of the man who physically handed you the bag. Is that what you are talking about?

"A. That's what I am talking about.

"Q. Okay.

"A. And there may have been a time or two that I received them from Max McCurdy himself."

[13 R. 1812]

* * * * *

"Q. Now, is it your testimony that McCurdy owed you money and he was paying you off in these coupons?

"A. Well, he owed me money for vending machine parts and vending machine, whatever the case may be, and he asked me to sell these coupons for him to apply to his bill. It had been on the books quite some time, so I knew he was kind of hard pressed, so I did it to help him out."

[13 R. 1814]

* * * * *

"Q. Now, how much did McCurdy owe you?

"A. I really don't know. It could have been $30. It could have been $100. I can't say now.

"Q. Your books show that?

"A. Yes. I have sales slips that shows my record of any sales that I might make, and the record of credits to the accounts.

"Q. Where are those records?

"A. I turned them over to my attorney.

"Q. Okay.

"Now, what was the face value of these coupons that you got from McCurdy?

"A. I have no idea.

"Q. No idea?

"A. It could be a nickel, it could be a dime. I have no idea.

"Q. I am not talking about each individual coupon. I am talking about this bag that you got from McCurdy. In the whole bag, what was the total face value of these coupons?

"A. I couldn't say.

"Q. You don't have any idea?

"A. No.

"Q. But you took them to the grocer and you sold them, didn't you?

"A. Yes.

"Q. And he paid you something for them?

"A. Yes.

"Q. And what did he pay you for them?

"A. I couldn't tell you. I don't remember. It wasn't a whole lot of money.

"Q. Was there some formula on the basis of which the grocer paid you?

"A. Yes.

"Q. What was the formula?

"A. He paid fifty cents on the dollar.

"Q. But you had no idea what the grocer paid you?

"A. No, not at this time. My records would indicate it, though.

"Q. Your records would indicate that?

"A. A credit to McCurdy's account."

[13 R. 1816-18]

* * * * *

Excerpts of the testimony given at trial by Paul B. Rothman, called as a witness by plaintiffs.

"Q. [By Mr. Bertain]* And would you state for us approximately when it was and where it was that you first entered the newspaper business?

"A. I have been in the newspaper business for approximately fifty-five years."

[12 R. 1534-35]

* * * * *

"MR. BERTAIN: I want to establish the foundation of this witness, Your Honor, as to his expertise in the newspaper business and particularly in the field of the circulation of newspapers.

"MR. HAAS: Well, this, then, is to be another expert witness?

"MR. BERTAIN: Yes.

"THE COURT: That's what I assumed."

[12 R. 1536]

* * * * *

"Q. [BY MR. HAAS] Now, your job for approximately ten years was to attempt to increase the circulation of the San Francisco Chronicle in the country?

"A. Northern California.

"Q. Northern California?

"A. Yes, sir.

"Q. Were you successful at that?

"A. I think so.

"Q. And you were the person who signed up Chronicle distributors and Chronicle carrier boys in the country?

"A. Yes, sir.

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*Counsel for plaintiffs-respondents.

"Q. There were written contracts, were there?

"A. Yes, sir."

[12 R. 1592-93]

* * * * *

"Q. [BY MR. HAAS] And you alluded to the carrier boy's route. Did these carrier boys have routes?

"A. Uh-huh.

"Q. And they were supposed to cover their routes?

"A. Uh-huh.

"Q. And they weren't supposed to go out on somebody else's route, were they?

"A. No.

"Q. And what would be the reason for that?

"A. Well, the time element, number one. Number two would be that the amount of papers in that, the amount of homes in that given area and he had enough to do to take care of that.

"Q. Right. And if you're going to get any newspaper distributed, you have to have some orderly method of distribution; isn't that right?

"A. That's right.

"Q. Everybody has to know where he is going to go next?

"A. Right.

"Q. The customers?

"A. We're talking about carrier boy.

"Q. We're talking about the carrier boy?

"A. That's right.

"Q. The boy has to know where to go?

"A. That's right.

"Q. And he is going to go there?

"A. That's right.

"Q. And you have to know who is responsible to whom because if Mrs. Smith doesn't get the paper, you have to find out who is responsible?

"A. That is right, sir.

"Q. And you can't just have carrier boys running around where they want to?

"A. That is right."

[12 R. 1595-96]

* * * * *

"Q. [By Mr. Haas] And was it also common practice in the newspaper business to have carrier boys have routes and that they be limited to serving those routes?

"A. As a rule it is a common practice; yes, sir.

"Q. All over the United States?

"A. All over the United States; yes, sir.

"Q. Now, did the country distributors for the Chronicle, while you were with the Chronicle, each have an area that he was supposed to take care of?

"A. Uh-huh.

"Q. A territory?

"A. Uh-huh.

"Q. And was he supposed to confine his activities to that territory?

"A. In that area; yes, sir.

"Q. And what was the reason for that?

"A. Well, the same reason that the carriers, that he had just so many things that he could do and so many miles that he could cover and so many places he could go to.

"Q. And was that type of provision common place in the newspaper industry?

"A. It is.

"Q. Throughout the United States?

"A. Throughout the United States."

[12 R. 1597-98]

Excerpts of the testimony given at trial by Dick D. Chaney, called as a witness by plaintiffs.

"Q. [By Mr. Fine] And will you state by whom you are presently employed?

"A. I am employed as circulation manager of the Sacramento Union."

[5 R. 465-66]

* * * * *

"Mr. Haas: Q. Let me hand you what has been marked as Exhibit 32 in evidence.

You will recall that these are the various forms of contracts of the Sacramento Union which Mr. Fine discussed with you this morning.

Will you turn, please, to the last page of that exhibit which is the Junior Independent Merchant Agreement.

Do you have that before you, sir?

A. Yes, sir.

Q. Would you read, please, to the jury, the provision of Paragraph 1(a).

A. "The dealer agrees to grant to carrier the exclusive right to deliver copies of the Sacramento Union in the territory designated as Route No. blank."

"Q. Now, the Home Delivery Contract, which is immediately preceding that Junior Independent Merchant Agreement, would you read to the jury the provisions of Paragraph 1(a).

"A. Company will grant to the contractor the exclusive right to deliver and sell to home subscribers copies of the morning daily and Sunday newspaper known as the Sacramento Union in District ....., a map of which is attached hereto as Exhibit A."

"Q. Does that mean that each home delivery dealer has an exclusive territory laid out on a map?

"A. That is correct.

"Q. And by an exclusive territory, I mean that he alone is the only person who is permitted to sell the Sacramento Union to home subscribers in that particular area?

"A. That is correct.

"Q. And that he has no competition from any other home delivery Union dealer in his own area?

"A. That is correct.

"Q. That is, he is limited to selling in a territory which is defined by this map?

"A. That is correct. How do we phrase that, that is not completely correct. He can possibly sell subscriptions in other areas, however, he cannot service or gain the profits of that particular subscription.

"Q. And what is the reason for that, Mr. Chaney?

"A. Well, the primary reason is if we did not exercise control along the lines of this, if Mrs. Smith would call in and complain about not receiving her paper, we wouldn't have the slightest idea who was her dealer or who to contact to make sure that she did get the paper.

"On the other hand, if we did not keep this type of information on hand, it would be virtually impossible for us to tell an individual dealer that Mrs. Smith wanted to subscribe, so we have to have something along those lines.

"Q. And by a parity of reasoning the dealer has just the same kind of arrangement with his carrier boys, correct?

"A. That is very true.

"Q. Now I ask you to imagine a situation in which instead of having these territories for the dealers and for the carrier boys, you pile up the, let's say, 60,000 copies of the Sacramento Union that are going to be sold in your city area one morning. You just pile them all up on the dock and you just have all the boys come down and all the dealers come down, and you sell them whatever they want, and they run out anyplace they want in Sacramento and attempt to sell them.

"In your opinion, is that kind of a feasible way to distribute a newspaper?

"A. It could be complete chaos.

"Q. It is essential, is it not, Mr. Chaney, that the newspaper be distributed in a timely manner?

"A. Our livelihood depends on it.

"Q. Your life depends on it, because if the subscriber does not get the paper when he is supposed to get it, he may take some other paper, like my client's paper?

"A. That is very true.

"Q. And throughout the newspaper business time is of the essence, is it not?

"A. Yes, very much so.

"It is not just from a subscriber's standpoint, it is from the advertiser's standpoint. If we can't get it into a home, if they are going to advertise in the morning newspaper, they expect it to be there for that individual to read the morning before he goes to work. If he can't read it, they are not going to advertise with us."

[5 R. 584-87]

Exemplars of newspaper articles in evidence regarding triple-damage antitrust cases.

[San Francisco *Chronicle*, Tuesday, October 5, 1971, page 1]:

TESTIMONY BEGINS ON ALIOTO TRIAL

"By George Draper
Chronicle Correspondent

Vancouver, Wash.

Mention of a $10,000 check that former Washington State Attorney General John J. O'Connell allegedly cashed in a Las Vegas casino in 1968 highlighted the opening yesterday of the $2.3 million civil-suit trial against San Francisco Mayor Joseph L. Alioto.

The check was brought up by attorney William Helsell in his opening statement in behalf of a group of cities

and public utilities districts suing Alioto, O'Connell and O'Connell's former assistant, George K. Faler. * * *

Alioto, O'Connell and Faler are being sued for recovery of $2.3 million in legal fees paid Alioto in the mid-'60s for prosecuting a series of treble-damage antitrust suits against large electrical manufacturers. Of that sum, Alioto gave O'Connell about $530,000 and Faler about $272,000.

The group now suing for recovery of the full $2.3 million is claiming it was not informed that the fees were to be shared by Alioto with the attorney general and his special assistant. * * *

[Ex. F to CT 732-43]

[San Francisco *Chronicle*, Wednesday, November 17, 1971, page 31]:

$300,000 AWARD IN TRUST SUIT

A jury yesterday awarded a judgment of $300,000 to Ford Wholesale Co. Inc., San Jose, in its treble-damage trade restraint suit against Fibreboard Paper Products Corp.

Ford charged that Fibreboard refused to sell its roofing products to Ford when it opened a warehouse facility in Oakland.

The case was heard by U.S. District Judge William T. Sweigert. Attorneys for the plaintiff in the action were Joseph M. Alioto and Maxwell Blecher, the son and a former associate of San Francisco Mayor Joseph L. Alioto.

[Ex. D to CT 732-43]

[San Francisco *Chronicle*, Tuesday, July 13, 1971, page 8]:

SUIT FILED IN TRADING STAMP WAR

A $10 billion antitrust suit, charging racial slurs, was filed in federal court here yesterday by the recently formed Black and Brown Trading Stamp Corp.

Named as defendants are Blue Chip Stamps, 13 major oil companies and seven super-market chains, all of whom give trading stamps to customers. * * *

The suit asks for $160 million actual damages from each defendant which, when trebled, is $10,080,000,000. In antitrust suits, if damages are proved, the damages are automatically trebled. * * *

[Ex. G to CT 732-43]

Excerpts from the trial court's instructions to the jury.

"[THE COURT] The second claim in this case is that the plaintiffs, Willard M. Noble and Etta M. Noble contend that they were injured by reason of defendants' alleged violation of Section 1 of the Sherman Act, in that the plaintiffs' refusal to agree to defendants' territorial restrictions on their sale and distribution of the Sacramento Bee Newspaper by splitting their dealership in half was a substantial factor in causing defendants to terminate them as distributors of the Sacramento Bee Newspaper, effective July 1, 1969.

"I will refer to this claim as plaintiffs' territorial restriction claim.

"Plaintiffs' territorial restriction claim is allegedly based on another Federal statute called Section 1 of the Sherman Act. That statute makes illegal any contract, combination or conspiracy which unreasonably restrains trade or commerce among several States or with foreign nations."

[17 R. 2333]

* * * * *

"[THE COURT] If you should find from the evidence that defendants or some of them wished plaintiffs to agree to confine their sales of the Sacramento Bee to a particular part of Newsstand No. 5, that the plaintiffs refused to agree to this, and that their alleged refusal was a substantial factor in the termination of the contract, you must then determine whether, if plaintiffs had agreed to the arrangement, an unreasonable restraint of interstate commerce would have resulted as a result of being a part of

an alleged arrangement between the Sacramento Bee, its distributors and carriers."

[17 R. 2335-36]

* * * * *

"[THE COURT] Section 4 of the Clayton Act provides that:

> 'Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.'

"If you should find from a preponderance of the evidence in the case that the plaintiffs, or either of them, are entitled to an award of damages, you must limit the amount of damages to the sum you shall find from the evidence was actually and proximately caused by the violation or violations of the Federal antitrust laws which you find to have occurred.

"You must not treble that amount and you must not include any sum for costs of suit or for a reasonable attorney's fees since it is the function and duty of the Court in the event that you should award damages to treble that amount in the judgment and it is also the Court's function to determine any, include in the judgment the amount properly to be allowed as plaintiffs' costs of suit including a reasonable fee for plaintiffs' attorneys.

"You have been instructed that the plaintiffs brought this action in this Federal Court under the provisions of Section 4 of the Clayton Act. Congress enacted Section 4 of the Clayton Act in 1914. Congress thereby granted the right to any party who had been injured in his business or property by reason of anything forbidden in the antitrust laws to sue and recover three times actual damages, to recover his costs of suit including a reasonable attorney's fees. Thus, these types of cases have been known as private treble damage antitrust actions. The private cause of action was intended by Congress to serve the dual purpose of permitting those injured by violations of the antitrust laws to recover damages and to aid the United States Government in enforcing the antitrust laws.

"In authorizing private remedies for persons injured by infractions of the antitrust laws, Congress intended to provide not only for private redress in damages, but also to secure more effective enforcement of antitrust legislation.

"The private antitrust action is a sanction granted to private —to a private plaintiff as distinct from the United States Government because of the public interest. It is clear that Congress imposed the penalty of treble damages on violators of the antitrust laws in order to deter other violators of the antitrust laws and to supply an ancillary force of private attorneys general to supplement the United States Department of Justice Antitrust Division in the enforcement of the Federal antitrust laws.

"The matter of treble damages is no function of the jury in a case of this kind and your function is to determine as accurately as you can from the evidence which you have heard the amount of compensation which will actually compensate the plaintiffs for any injury to their business or property, no more, no less. You are not to include any such items, for example, as costs of litigation, attorney's fees, interest or any other such item. Your function is only to determine the actual damages, if any, sustained by the plaintiffs."

[17 R. 2345-47]

Instructions Requested by Plaintiffs, but Refused by the District Court.

Plaintiffs' territorial restriction claim is based on Section 1 of the Sherman Act. That statute provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Pursuant to this provi-

sion of the antitrust laws certain agreements or practices are conclusively presumed to be illegal because of their pernicious effect on competition and lack of any redeeming virtue. These agreements or practices are called *per se* violations. One such *per se* violation is vertically imposed restrictions upon the resale of a product by a manufacturer after he has parted with ownership of it. That is to say, once a manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of § 1 of the Sherman Act.

In the instant case plaintiffs claim that defendant McClatchy Newspapers, pursuant to explicit written agreements, silent combinations, and understandings with its city carriers, country carriers, country distributors and city newsstand distributors restricted the territory where the Sacramento Bee may be sold by said carriers and distributors after defendant McClatchy Newspapers parted with ownership of the Sacramento Bee. If you find that this is the case then you shall find that defendant McClatchy Newspapers violated Section 1 of the Sherman Act.

Because a vertically imposed restriction upon the resale of a product by a manufacturer after it has parted with ownership of it is a *per se* violation of Section 1 of the Sherman Act it is unnecessary for plaintiffs to prove that there has been a restraint of interstate trade and commerce as a result of such restriction—it is presumed.